I-Expo Sdn Bhd v TNB Engineering Corp Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-22–1196 OF 2006
LAU BEE LAN J
29 OCTOBER 2014

Contract — Termination — Validity — Whether contract validly terminated by defendant as result of fundamental breaches by plaintiff — Whether plaintiff failed to prove contract was varied — Whether defendant justified in suspending plaintiff's works for breach of environmental laws — Whether plaintiff not entitled to claim 'idling costs' for period works were suspended because it could not take advantage of its own wrong — Whether plaintiff should have mitigated losses by removing workers and equipment from site when works were suspended

The defendant awarded a consortium, comprising the plaintiff and another entity, a contract to carry out the dismantling, demolition and disposal of three thermal units and a 132kV switchyard at a power station. The letter of award ('LOA') of the contract required the consortium to, inter alia, procure a RM3m performance bond in the defendant's favour, pay the defendant an initial sum of RM12m and then a second payment of RM2m. The LOA entitled the defendant to revoke the contract if those requirements were not fulfilled. The plaintiff was responsible under the consortium agreement to make the two payments and provide the performance bond as well as to carry out the works whilst ensuring that a good dust suppression system was in place and that Department of Environment ('DOE') regulations in the disposal of scheduled wastes was complied with. The plaintiff was unable to provide the performance bond or make the second payment after the initial payment of RM12m to the defendant was settled by a third party. The plaintiff proposed various alternative methods to substitute the procurement of the performance bond and the second payment but these were not agreeable to the defendant resulting in the defendant ultimately terminating the LOA on 17 November 2006. The termination was on the grounds of failure to provide the performance bond and the second payment, failure to exercise adequate dust control at the work site, violation of DOE regulations and delay in completion of works. The defendant suspended the plaintiff's works on 20 July 2006 after DOE officials visited the work site and found environmental regulations had been breached. Despite the termination of the contract, the parties entered into a compromise on 30 January 2007 that allowed the plaintiff to continue to carry out the works until completion. In the instant suit, the plaintiff claimed damages for wrongful termination of the LOA and for being wrongfully barred access to the work site from 20 July 2006 until the date the LOA was terminated resulting in 'idling costs' between the two dates and, again, from the time the LOA was

terminated until the date of the compromise on 30 January 2007. The plaintiff also claimed damages for not being allowed to carry out certain additional works at the site which were referred to as 'package B' under the LOA.

Held, dismissing the claim:

(1) The defendant was entitled to revoke the LOA on the plaintiff's failure to provide the performance bond and the second payment within the stipulated periods. The defendant's several letters requesting for the bond and the plaintiff's admission that it was still due as late as 12 October 2006 showed that the requirement for the bond was never waived. The plaintiff failed to discharge its burden under s 103 of the Evidence Act 1950 to show the contract had been varied. The Court found there was no variation but instead the defendant had granted the plaintiff an indulgence in respect of the performance bond and the second payment (see paras 44, 45 (f) and 54)

(2) The defendant was justified in suspending the works on site on 20 July 2006 until the DOE issue was resolved. DOE officials visited the site on 29 June 2006 and identified environmental regulation breaches particularly in relation to disposal of scheduled wastes. The court found the plaintiff's failure to provide a dust suppression system also caused pollution. Consequently, the plaintiff was not entitled to idling costs between 20 July 2006 and 17 November 2006 as it could not take advantage of its own wrong. The plaintiff should have mitigated its losses by demobilising its staff and machinery on site. There was no reason for them to remain on site for four months without doing any work. As the termination of the LOA was valid, the plaintiff was not entitled to claim loss and expenses from the termination date until 30 January 2007 (see paras 48, 48(a), 50, 51 and 59).

(3) On a true construction of the LOA, the Court found package B was never awarded to the plaintiff. Clause 3(b) of the LOA gave the consortium a first right of refusal to undertake package B as additional works only if the consortium's performance of package A was satisfactory to the defendant. As the LOA was terminated due to the plaintiff's poor performance, the defendant was not obliged to award package B to the plaintiff since the precondition in cl 3(b) was not satisfied (see paras 66 and 66(a)).

[Bahasa Malaysia summary

Defendan mengawardkan konsortium, yang terdiri daripada plaintif dan entiti yang lain, kontrak untuk melaksanakan pembongkaran, perobohan dan pelupusan tiga unit termal dan switchyard 132kV di stesen kuasa. Surat award ('SA') bagi kontrak yang diperlukan konsortium untuk, antara lain, mendapatkan bon prestasi RM3 juta memihak kepada defendan, defendan membayar jumlah awal sebanyak RM12 juta dan kemudian bayaran kedua

RM2 juta. SA memberikan hak defendan untuk membatalkan kontrak jika kehendak itu tidak dipenuhi. Plaintif adalah bertanggungjawab di bawah perjanjian konsortium untuk membuat dua pembayaran dan menyediakan bon pelaksanaan dan juga untuk menjalankan kerja-kerja di samping memastikan sistem penindasan debu yang baik berada di tempat dan Jabatan Alam Sekitar ('JAS') peraturan-peraturan yang pelupusan buangan terjadual telah dipatuhi. Plaintif tidak dapat menyediakan bon pelaksanaan atau membuat bayaran kedua selepas bayaran awal RM12 juta kepada defendan telah diselesaikan oleh pihak ketiga. Plaintif mencadangkan pelbagai kaedah alternatif untuk menggantikan perolehan bon pelaksanaan dan bayaran kedua tetapi ini tidak bersetuju dengan defendan menyebabkan defendan akhirnya menamatkan SA pada 17 November 2006. Penamatan ini adalah atas sebab-sebab kegagalan untuk menyediakan bon prestasi dan kedua pembayaran, kegagalan untuk melaksanakan kawalan habuk yang mencukupi di tapak kerja, melanggar peraturan-peraturan JAS dan kelewatan dalam menyiapkan kerja-kerja. Defendan menggantung kerja plaintif pada 20 Julai 2006 selepas pegawai JAS melawat tapak kerja dan mendapati peraturan alam sekitar telah dilanggar. Walaupun penamatan kontrak itu, pihak-pihak membuat suatu kompromi pada 30 Januari 2007 yang membenarkan plaintif untuk terus melaksanakan kerja-kerja sehingga selesai. Dalam saman ini, plaintif mendakwa ganti rugi bagi penamatan salah SA dan bagi halangan akses secara salah kepada tapak kerja dari 20 Julai 2006 sehingga tarikh SA telah ditamatkan mengakibatkan 'idling cost' antara kedua-dua tarikh dan, sekali lagi, dari masa SA telah ditamatkan sehingga tarikh kompromi pada 30 Januari 2007. Plaintif juga mendakwa ganti rugi kerana tidak dibenarkan untuk menjalankan kerja-kerja tambahan tertentu di tapak kerja yang dirujuk sebagai 'pakej B' di bawah SA.

Diputuskan, menolak tuntutan:

(1) Defendan berhak untuk membatalkan SA atas kegagalan plaintif untuk menyediakan bon pelaksanaan dan bayaran kedua dalam tempoh yang ditetapkan. Defendan dalam beberapa surat meminta untuk bon dan kemasukan plaintif bahawa ia adalah masih selewat 12 Oktober 2006 menunjukkan bahawa keperluan bagi bon tidak pernah diketepikan. Plaintif gagal melaksanakan beban di bawah s 103 Akta Keterangan 1950 untuk menunjukkan kontrak itu telah diubah. Mahkamah mendapati tidak ada perbezaan tetapi sebaliknya defendan telah memberikan plaintif kelonggaran berkenaan dengan bon pelaksanaan dan bayaran kedua (lihat perenggan 44, 45 (f) dan 54).

(2) Defendan telah dibenarkan untuk menggantung kerja-kerja di tapak kerja pada 20 Julai 2006 sehingga isu JAS telah diselesaikan. Pegawai JAS melawat tapak pada 29 Jun 2006 dan pelanggaran peraturan alam sekitar dikenal pasti khususnya berhubung dengan pelupusan buangan terjadual. Mahkamah mendapati kegagalan plaintif untuk menyediakan

satu sistem penyekatan debu pencemaran juga berlaku. Oleh yang demikian, plaintif tidak berhak kepada kos melahu antara 20 Julai 2006 dan 17 November 2006 kerana ia tidak boleh mengambil kesempatan daripada salah sendiri. Plaintif seharusnya boleh mengurangkan kerugian dengan memberhentikan kakitangan dan jenteranya di tapak. Tidak ada sebab untuk mereka kekal di lokasi selama empat bulan tanpa melakukan apa-apa kerja. Memandangkan penamatan LOA itu adalah sah, plaintif tidak berhak untuk menuntut kerugian dan perbelanjaan dari tarikh penamatan itu sehingga 30 Januari 2007 (lihat perenggan 48, 48(a), 50, 51 dan 59).

(3) Pada konstruksi sebenar LOA, mahkamah mendapati pakej B tidak pernah diberikan kepada plaintif. Klausa 3(b) daripada LOA memberi konsortium itu hak pertama keengganan untuk melaksanakan pakej B sebagai kerja-kerja tambahan hanya jika prestasi Konsortium tersebut pakej A adalah memuaskan kepada defendan. Sebagai LOA telah ditamatkan kerana prestasi yang lemah plaintif, defendan tidak diwajibkan untuk anugerah pakej B kepada plaintif kerana prasyarat dalam klausa 3(b) tidak dipenuhi (lihat perenggan 66 dan 66(a)).]

Notes

For cases on validity, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6545–6557.

Cases referred to

Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor [1996] 3 MLJ 627, CA (refd)

Watson v Healy Lands Limited [1965] NZLR 511, HC (refd)

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)

Byrne & Co v Leon Van Tienhoven & Co (1880) 5 CPD 344 (refd)

RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd [2010] 2 MLJ 188, FC (refd)

ABB Distribution Sdn Bhd v GKM Development Sdn Bhd & Anor [1998] 7 MLJ 292, HC (refd)

BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd [2011] EWCA Civ 548, CA (refd)

Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd [1999] 3 MLJ 489; [1999] 3 CLJ 577, CA (refd)

Roberts v The Bury Improvement Commissioners 1870 LR 5CP 310 (refd)

Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd [2011] 5 MLJ 1, CA (refd)

Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors. [1998] 1 MLJ 465, FC (refd)

Professor Dr A Kahar Bador & Ors v N Krishnan & Ors [1983] 1 MLJ 407 (refd)

Leong Ah Tee v Soo Ah Hing [1999] MLJU 730; [2000] 6 CLJ 423, HC (refd)
Tan Leng Choo & Ors v Law Teck Huat [2009] 1 MLJ 820, CA (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98 (refd)
Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd [1979] 1 MLJ 129, FC (refd)
Nga Sheau Sheau v United Merchant Finance Bhd [2004] 4 MLJ 53; [2004] 3 CLJ 243, HC (refd)

B Thangaraj (Azad Bashir and Asha Abdullah with him) (Bashir & Asha) for the plaintiff.
S Suhendran (M Sanjay and K Gobinath) (Kadir, Andri & Partners) for the defendant.

Lau Bee Lan J:

BACKGROUND FACTS

[1] Tenaga Nasional Bhd ('TNB') who is the owner of the Perai Power Station was undertaking the re-development of the Perai Power Station by constructing a new plant at the same site to improve and strengthen its national electricity supply system. The re-development of the Perai Power Station required the removal of three units of 120MW once through seawater cooled thermal units ('3 thermal units').

[2] The defendant, TNB Engineering Corp Sdn Bhd (TNEC) (a wholly owned subsidiary of the TNB) was requested to remove the three thermal units. The defendant issued a proposal to TNB setting out how the works were to be carried out titled TNB Engineering Corp Sdn Bhd Request for proposal on sale, dismantling, demolition and disposal 3 X 120MW Thermal Units Perai Power Station October 2005 ('defendant's RFP') (B2/268-339).

[3] On 1 September 2005(B2/ 29-30), the plaintiff, l-Expo Sdn Bhd issued its letter of intent to participate as the main contractor in the sale, dismantling, demolition and disposal of three thermal units. Vide the same letter of intent, the plaintiff informed the defendant that Encik Mohd Said Baharuddin was the plaintiffs project director and authorised lead representative.

[4] On 20 September 2005 (B2/35-264), the plaintiff forwarded its tender proposal to the defendant.

[5] By a letter of acceptance dated 15 February 2006 (B2/ 448-452), TNB awarded a contract (TNB award') to the defendant to carry out:

(i) package A(1) - (Main Plant): Sale, Dismantling and Demolition of 3 x 120MW Thermal Units down to ground level (GL) = 0m inclusive of Power Block area, Chimney, Tank Farm area, Water Treatment Plant, old Administration Building and other ancillary buildings, not inclusive of:

The construction for 3 x 1MVA (11kv7415V) substations to cater for Demolition Works and future EPC Works

Dismantling & Demolition of Cooling Water System and Fuel Oil Pipeline from Bulk Cargo Terminal to Tank Farm

(ii) package A(2) - Additional Works for demolition of substructures down to pile cap level, excavation and backfilling up to 150mm above ground water level. The works scope includes maintaining dewatering works, permanent sheet piles cut-off wall bordering SKS Perai fencing and removal of contaminated soil foil sludge).

(iii) (iii) package B (132kV Switchyard) - Sale, Dismantling and Disposal of the existing 132kV Switchyard including dismantling and transporting to Transmission's Bukit Tambun warehouse. (Emphasis added)

[6] The defendant through its letter of award dated 3 February 2006 ('LOA')(B2/389-392) awarded a contract to a consortium comprising TNEC Construction Sdn Bhd (TNECC) and the plaintiff the contract to carry out package A(1) and package B works of the TNB Award. These packages were named package A(i) and package A(ii) respectively as can be seen below:

(a) package A

(i) Decommissioning, Sale, Dismantling, Demolition and Disposal of the existing 3 x 120MW Thermal Units at Perai Power Station down to zero (0) meter level.

(ii) Decommissioning, Sale, Dismantling, Demolition and Disposal of the existing 132kV Switchyard including dismantling and transporting certain components (as per agreed list) to transmission's warehouse at Bukit Tambun.

[7] However it is to be noted package B under the LOA (or package A(2) of the TNB Award) was for additional works in relation to the demolition of substructures down to pile cap-level, excavation and backfilling (see para 5 above). For completeness the LOA was referred by the plaintiff as 'sub-contract' in the plaintiff's submission.

[8] The essential terms of the LOA are:

(a) the consortium would pay RM12m to the defendant within two weeks of the acceptance of the LOA ('initial payment') (cl 3(i) of the LOA, B2/390);

(b) the consortium would procure a performance security bond for a sum of

RM3m in favour of the defendant within two weeks of the acceptance of the LOA ('performance bond') (cl 3d of the LOA, B2/390);

(c) the consortium would pay an additional RM2m within three months of the acceptance of the LOA ('further payment') (cl 3(ii) of the LOA, B2/390);

(d) in consideration for the initial and further payments, the consortium was allowed to retain the proceeds from the sale of scrap materials from the works (B2/390);

(e) the defendant could revoke the LOA if the consortium failed to pay the initial payment and/or further payment and/or provide the performance bond (cl 7 of the LOA, B2/391);

(f) the completion date of the project was 31 March 2007 (Clause 3 of the LOA, B2/390).

[9] On 13 February 2006 a consortium agreement was entered by the plaintiff and TNECC ('consortium agreement') (B2/411-441). Pursuant to cl 3.3 of the consortium agreement, the plaintiff agreed to carry the works, pay the initial payment, to provide the performance bond and to pay the further payment to the defendant under the LOA. In consideration thereof, the plaintiff was allowed to retain the proceeds from the sale of scrap materials.

[10] Pursuant to cl 3.3 of the consortium agreement too, the plaintiff's obligations included the provision of the work and materials specified in Schedule 1 part A of the consortium agreement as follows:

(a) the plaintiff would put in place a good dust suppression system throughout the demolition contract execution (Item A4, B2/435); and

(b) the disposal off any scheduled waste must comply strictly with DOE regulations (Item A5, B2/436).

[11] On 25 February 2006 (B2/453), the consortium accepted the LOA; thus the contract is between the defendant and the consortium (comprising TNECC and the plaintiff).

[12] The project site was handed to the plaintiff vide a letter dated 23 March 2006 (B3/670) known as the notice to proceed ('NTP').

[13] By a letter dated 7 March 2006 (B3/638-640) a company known as Metro Ganda Sdn Bhd ('Metro Ganda') made the Initial payment of RM12m to the defendant.

[14] However, the plaintiff failed to provide the performance bond on 11 March 2006, being two weeks from the date of acceptance of the LOA (being 25 February 2006).

By a letter dated 17 March 2006 (B5/1091-1092) to the consortium the defendant demanded for the performance bond to be provided. The plaintiff did not respond.

The defendant issued reminders dated 24 March 2006 (B5/1094) and 31 March 2006 (B5/1096) to the consortium demanding for the performance bond to be provided failing which the LOA would be revoked.

TNECC in turn issued demand letters dated 17 March 2006 (B5/1093), 24 March 2006 (B5/1095) and 1 April 2006 (B5/1097) to the plaintiff demanding the issuance of the performance bond.

[15] The plaintiff was not in a position to procure the performance bond and did not have the RM2m to make the further payment. So, the plaintiff proposed an alternative, which was essentially a reduction in the amount of monies which they had to pay upfront.

[16] On 3 April 2006 (B3/683-684), the plaintiff responded to the consortium suggesting, inter alia, that the initial payment of RM12m to the defendant on 7 March 2006 (B3/638-640) be re-apportioned as follows:

RM9m was to be used as part payment of the initial payment of RM12m and the further payment of RM2m, leaving a sum of RM5m outstanding. The RM5m was to be paid from the sale of copper and scrap metals.

RM3m was to be treated as the payment for performance bond.

[17] On 7 April 2006 (B3/685-686) TNECC agreed, providing, inter alia, that the proceeds of sale of the scrap metal was to be made directly by the plaintiff to the defendant or its stakeholder to settle the outstanding contract sum.

[18] However, this arrangement did not materialise as the plaintiff did not accept the terms as mentioned in TNECC's letter dated 7 April 2006.

[19] On 24 April 2006 (B7/1670-1671) the defendant agreed to the plaintiffs request for a deferment of the submission of the performance bond subject to the conditions, inter alia, that all proceeds of sale be made to Messrs Loftan Ismail & Assocs as stakeholders for the purpose of paying sub-contractors. Once again these terms were not accepted.

[20] Thereafter, vide an undated letter signed by Md Din bin Hassan (authorised representative) (forwarded to the defendant on 8 May 2006, B3/719), the plaintiff proposed that the sum of RM5,000,000 from the sale of the turbine units from the project be paid directly to the defendant in satisfaction of the performance bond and the further payment. The defendant did not accept this proposal.

[21] However, on 15 August 2006 vide a letter of even date signed by Abdul Mutalib Ibrahim (Managing Director (B3/848), of its own accord and volition, the plaintiff submitted another proposal to the defendant for the resolution of the issues of the performance bond and the further payment. This proposal was also not accepted by the defendant.

[22] In addition, the plaintiff, by letter dated 16 August 2006 (B3/851), submitted further proposals to resolve the outstanding issues of the performance bond and further payment. Neither of these proposals were acceptable nor accepted by the defendant.

[23] On 18 August 2006 (B3/852-854), Monogal a/l Appuny obtained an injunction against the plaintiff to restrain the plaintiff from, inter alia, extracting the scrap metals from the site.

[24] On 23 August 2006 (B3/855-856), Perai Power Sdn Bhd demanded payment of RM1.77m from TNB due to the fact that the plaintiff had failed to exercise adequate dust control and mitigation. TNB, in turn, held the defendant responsible for resolving this claim.

[25] On 12 October 2006 (B3/877-880), the defendant vide its letter to the plaintiff gave thirty days' notice to the plaintiff to remedy its various breaches including but not limited to providing the performance bond together with the further payment to the defendant.

[26] However, the plaintiff vide letter dated 8 November 2006 (B3/881-891), denied its aforesaid breaches and the plaintiff expressed clearly in its letter that it would not remedy the alleged breaches as demanded by the defendant.

[27] As such, on 17 November 2006 (B4/907-912), the defendant terminated the LOA by issuing a notice to revoke the LOA (the Revocation letter) for, inter alia, the plaintiff's failure in securing the performance bond and to pay the further payment to the defendant.

[28] On 27 November 2006, the plaintiff filed this action.

[29] On 25 January 2007 (B4/918–946), the plaintiff obtained an injunction to allow the plaintiff to enter the project site ('the Injunction').

[30] The plaintiff was aware that under the LOA, it had to pay the further payment and provide the performance bond as can be seen from the admissions in the plaintiffs solicitor's letters dated 26 February 2007 (B4/992–994) and 5 March 2006 (B4/997–998).

[31] On 5 March 2007 (B4/999–1001), the plaintiff made the further payment, but only after termination on 17 November 2006 (see para 27 above).

[32] On 18 June 2007 the defendant applied to set aside/vary the injunction.

[33] On 25 February 2008 (B3/1031–1042), at the hearing of the defendant's application to set aside/vary the injunction, and as a commercial interim settlement, the parties entered into a consent order to, inter alia, to discharge the injunction and to allow the plaintiff to complete the works on site ('the consent order').

[34] In May 2009 the plaintiff completed its works at the site.

[35] The plaintiff's claim is basically for breach of contract in that the defendant allegedly:

(a) wrongfully prevented the plaintiff from having site access of the Perai Power Station to continue with its works from 20 July 2006 to 17 November 2006;

(b) wrongfully terminating the LOA (defendant's letter of award dated 3 February 2006 between the plaintiff and the defendant) on 17 November 2006 giving rise to a claim for idling costs from 17 November 2006 to 30 January 2007 (the date when the compromise was reached) thus giving rise to a claim for idling costs of RM2,294,031.77 for the respective periods (para 26(b) and (c) of the amended statement of claim at p 49); and

(c) failed to allow the plaintiff to commence package B works thus giving rise to a claim for damages of RM5,052,683(para 26(a) of the amended statement of claim at p 49).

[36] The plaintiff called 1 witness, Encik Abdul Mutalib bin Ibrahim (PW1 or SP1 in the notes of evidence (NOE)), the ex-director of the plaintiff whilst the defendant had two witnesses, Encik Mohd Noor bin Harun (DW1), the

ex-senior project director of the defendant and Encik Mohd Sabri bin Zain (DW2), the managing director of the defendant.

[37] It was agreed that liability would be decided first and that damages be assessed by the registrar if liability is established in favour of the plaintiff.

ISSUES

[38] Upon a consideration of the issues submitted by the parties, the court is of the view the issues to be tried are:

(a) whether the plaintiffs action is misconceived as it must bring the action in the joint names of the plaintiff and TNECC;

(b) whether by the terms of the LOA dated 3/2/2006 the plaintiff was awarded the package B works;

(c) whether the plaintiff is entitled to idling costs for the period between 20 July 2006 (suspension) to 17 November 2006;

(d) whether the defendant was justified in terminating LOA on 17 November 2006;

(e) whether the plaintiff is entitled to idling costs for the period between 17 November 2006 (termination) to 30 January 2007 (date when a compromise was reached).

I shall deal with the issues below though not necessarily in the order above.

FINDINGS

Whether the plaintiffs action is misconceived as it must bring the action in the joint names of the plaintiff and TNECC

[39] The plaintiff has locus standi to commence this suit in its own name. It is not fatal that the plaintiff has not included TNECC as a plaintiff to the proceedings because cl 18 requires the plaintiff and TNECC to jointly instruct solicitors 'to handle the claim (brought by or against either or both of the parties under the sub contract) or any other party in respect of a claim in any way arising out of the performance by the parties of the sub contract'; and (ii) if there is a dispute between the parties as to the conduct of the claim or as to whether a claim should be made, the matter shall be referred to the solicitors and the parties shall follow the advice; and (iii) this is due to financial implications arising from the claims made wherein the parties in accordance to a certain proportion shall bear the costs and expenses during the continuance of the claim and thereafter apportioning the total amount of costs and expenses incurred.

(a) hence what is required is for the plaintiff to at least request TNECC to decide whether to commence these proceedings.

Whether the plaintiff is entitled to the idling costs for the period between 20/7/2006 (suspension) to 17 November 2006

[40] The plaintiff contends that the issuance of the NTP dated 23 March 2006 (B3/670) fixes the commencement date of the LOA to be 22 March 2006 and shows that the plaintiff has fulfilled all pre-conditions under the LOA meaning that the requirement for the production of the performance bond and the payment of the further payment *was somehow varied*. With respect I disagree for the following reasons.

[41] First, cl 4.1 of the defendant's RFP which forms part of the LOA states that the commencement date for package A shall be the date of the Notice to Proceed issued by the employer to the contractor. This was admitted by SP1 in cross-examination (NOE dated 29 April 2013 p 42 lines 10–11, 17–19, 35–36, p 43 line 1):

> KGB Now rujuk kepada Notice To Proceed yang telah diisukan dalam kes ini, ya, di mukasurat 670, B3.
>
> ...
>
> KGB 670, B3. Ok, so, notis ini bertarikh 23.3.2006, jika kita rujuk di perenggan 2, notis ini menyatakan bahawa tarikh bermula kerja adalah pada 22.3.2006, betul?
>
> ...
>
> KGB So setuju notis ini bertujuan untuk menetapkan.
>
> ...
>
> KGB Setuju bahawa notis ini adalah bertujuan untuk memperuntukan tarikh permulaan kerja?
>
> MUTALIB Setuju.

[42] Secondly, the only precondition of the LOA as stated in para 2 of the LOA is that 'This letter of award is conditional upon receipt and signing of acceptance by TNEC of the letter of award from TNB for this Contract.' At the material time when the NTP was issued (23 March 2006), the defendant has received the TNB Award and thus the NTP issued confirmed that the said precondition has been met.

[43] Thirdly, irrespective of the issuance of the NTP, the plaintiff is obliged to secure the performance bond and pay the further payment within the time stipulated as is evident from the plaintiff's proposal to the defendant

(B2/35–264), particularly at p 234. This was admitted by SP1 during cross-examination (NOE dated 29 April 2013 p 45 lines 18, 34–35, p 46 lines 5–19):

'KGB Encik Mutalib, rujuk kepada mukasurat 234, Bundle B2.

...

KGB Tadi Encik Mutalib menyatakan bahawa, Encik Mutalib dah tengok l-Expo, proposal dah l-Expo sebelum ini, betul?

...

MUTALIB Ya.

KGB Rujuk kepada perenggan C, di bawah itu, ya, perenggan C. Ok?

MUTALIB Ya.

KGB Perenggan C memperuntukan bahawa, Upon issuance of Notice to Proceed, full payment of contract price, provision of acceptable performance security. So, perenggan ini menunjukkan bahawa bayaran-bayaran boleh juga dibuat selepas Notice to Proceed di isukan, betul? MUTALIB Ya, betul.

[44] Fourthly, I find the plaintiff has not discharged its burden under s 103 of the Evidence Act that an agreement to vary the terms of the contract had been reached between the parties (see *Juahir bin Sadikon v Perbadanan Kemajuan Ekonomi Negeri Johor* [1996] 3 MLJ 627(CA) at p 635 C-E). The alleged variation which the plaintiff alleges of is that sometime in the mid-March 2006, the defendant agreed to vary the payment provisions in that it was agreed there was no requirement to provide a performance bond and the further payment on the times specified but these were to be funded by the sale of the turbine units to a purchaser introduced by the defendant at a price to be agreed by the defendant. I find the plaintiff has failed to prove the existence of the alleged variation for the following reasons:

(a) first, there is no correspondence from the plaintiff to the defendant supporting a variation as admitted by SP1 in cross-examination (NOE dated 29 April 2013 p 72 lines 14–23):

KGB For submission of Performance Guarantee, ok. Encik Mutalib, dalam surat ini, apa yang diminta oleh Defendan daripada Konsortium adalah untuk mengemukakan Bon Guarantee, betul?

MUTALIB Betul.

KGB Dalam surat ini, tiada sebarang pernyataan mengenai variasi yang Encik Mutalib cadangkan.

MUTALIB Betul.

(b) on the contrary, the correspondence and minutes of meetings show repeated requests by the plaintiff seeking indulgence on the provision of

the performance bond and payment of the further payment to the defendant's demand letters dated 17 March 2006, 24 March 2006 and 31 March 2006 to the consortium which clearly point to the plaintiffs failure to secure the performance bond within the time stipulated (B5/1091, B5/1094 and B5/1096 respectively). Similar letters were sent by TNECC to the plaintiff dated 17 March 2006, 24 March 2006 and 1 April 2005 (B5/1092–1093, B5/1095 and B5/1097 respectively). The plaintiff did not reply to any of the said demand letters and there was no mention of variation as such would have been a natural response from the plaintiff. The aforesaid state of affairs is evident from the cross-examination of SP1 (NOE dated 29/4/2013 p 72 lines 35-37; p 73 lines 1-21 & 29-37; p.74 lines 1-4):

KGB Now Encik Mutalib, merujuk kepada mukasurat 1093.

YA 1093.

KGB Bundle yang sama, B5. Ini adalah surat daripada TNEC Construction, ok, kepada Plaintif sendiri. Again, rujuk kepada jadual surat ini, Letter of Demand for submission of Performance Guarantee. Setuju surat ini juga adalah berkenaan dengan mengemukakan Bon Pelaksanaan daripada TNEC Construction kepada Plaintif?

MUTALIB Setuju.

KGB Setuju. Tidak ada sebarang pernyataan mengenai variasi dalam surat ini?

MUTALIB Setuju.

KGB Dan Plaintiff tidak jawab surat ini kata ada variasi.

MUTALIB Setuju.

KGB Now Encik Mutalib, rujuk kepada mukasurat 1094, surat Defendan bertarikh 24.3.2006. Again, yang jadual itu, First reminder for submission of Performance Guarantee.

KGB YA First reminder for submission of Performance Guarantee.

Ya. KGB Ok. Dan jika rujuk kepada surat ini, Encik Mutalib.

YA

Setuju, ya? Setuju ya, title, tajuk dia.

MUTALIB Ya.

KGB Setuju kandungan surat ini.

MUTALIB Ya.

(c) further the consortium's letter of 15 March 2006 (B3/668) requesting for extension of time from the defendant to secure the performance bond put paid to the plaintiff's contention of the alleged variation.

[45] The plaintiff alleged that the three letters from the defendant and three from TNECC referred to in para 44(b) above were never received until 24 April 2006. I find there is no basis for such an allegation. Whereas the defendant through SD1 explained that these letters were handed to the plaintiff's representative, En Mohd Said Baharudin on the date of the said letters (WSDW1 Q&A 29 (examination-in-chief) & NOE dated 21 May 2013 pp 14 lines 31–37 to p 15 lines 1–12 (re-examination of DW1); NOE dated 29 April 2013 pp 78–79 — cross-examination of SP1). These letters were all sent by facsimile to the plaintiff's office in Penang on 24 April 2006 which is evident from the facsimile number contained at the bottom of the page of each of the relevant pages. For argument sake, even if the court is to accept that the said letters were received by the plaintiff on 24 April 2006, the plaintiff never alleged variation. What is significant is that in the ongoing discussions between the parties as a result of the plaintiff's request/proposal to vary the terms of the agreement vide the following letters, there is no mention of the alleged variation at all:

(a) a letter dated 3 April 2006 (B3/683) from the plaintiff to the consortium proposing that the initial payment of RM12m to the defendant on 7 March 2006 be re-apportioned as follows:

(b) RM9m was to be used as part payment of the Initial Payment of RM12m and the further payment of RM2m, leaving a sum of RM5m outstanding;

(c) The RM5m was to be paid from the sale of copper and scrap metals;

(d) RM3m was to be treated as the payment for Performance Bond.

(a) in an undated letter (received by the defendant on 8 May 2006) (B/719) the plaintiff proposed to the consortium to pay the sum of RM5m by way of sale of three units of turbines and related auxiliaries, structures and spares to the generating units to Mutiatra Powertech Sdn Bhd.

(b) vide a letter dated 15 August 2006 (B/848), the plaintiff further proposed to the defendant referring to its obligations to pay the contract sum (see para 3 of the letter).

(c) vide a letter dated 16 August 2006 (B/851) to the defendant, the plaintiff referred to its obligations to settle the payments provided under the LOA. SP1 admitted in cross-examination that there was nothing mentioned about the alleged variation despite being aware that default of payment to meet with the plaintiff's obligations under cl 7 can cause the defendant to terminate the contract (NOE dated 29 April 2013 p 108 lines 3–20).

(d) SP1 further admitted in cross-examination that:

(i) that when the letter dated 12 October 2006 (B/878) was issued to the

plaintiff, the plaintiff was already in delay of seven months to secure the performance bond and five months in making the further payment (NOE dated 29 April 2013 p 111 lines 3–32); and

(ii) that when the plaintiff made the further payment on 5 March 2006, the payment is made in compliance of its obligations under the LOA (B4 /99–1001).

(e) The continued requests for the performance bond vide the defendant's letters of 17 March 2006, 24 March 2006 and 31 March 2006 (see para 44(b) above) and the admission by the plaintiff that it was still due as late as 12 October 2006 (see para 45(e) above) show that no waiver of the performance bond could have occurred on 23 March 2006 at the time of entering into the site as the plaintiff alleges. This is because in order to prove waiver it must be shown (i) there was unambiguous representation by the representee arising as the result of a positive and intentional act done by the representor with knowledge of all the material circumstances; and (ii) and relying on the representation, the representee has carried out the new arrangement (see *Watson v Healy Lands Limited* [1965] NZLR 511 [514 paras 30-35]. There is no such proof.

[46] The plaintiff submits there is no provision in the LOA to suspend the works of the plaintiff at the Perai Power Station and for the defendant to instruct the plaintiff to vacate the Perai Power Station unless the LOA is properly terminated.

With respect I cannot accept the plaintiffs contention. My reasons are these. The issuance of the NTP (23/3/206) must be taken in the context of the ongoing discussions between the parties as a result of the request from the plaintiff to vary the terms of the agreement which I alluded to in paras 45–45.5 above. It was an indulgence given by the defendant. I agree with the defendant's submission that Once there is a repudiatory breach of contract, the innocent party has an option or elect either to affirm the contract or accept the repudiation and terminate the contract. Support for this proposition is found in the case of *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 at p 607 para 13, where Gopal Sri Ram FCJ (as he then was) speaking on behalf of the Federal Court) stated:

> He or she may elect to accept the repudiation, treat the contract as at an end and sue for damages. ... Alternatively, he or she may elect to reject the repudiation and treat the contract as subsisting. Whether the one or the other course was adopted by the promise – the innocent party – is a fact that is to be inferred by the court from the objective facts, including the words and conduct of the parties. ...

Further, I agree from the authorities relied on by the defendant, the innocent party may take its time to persuade the guilty to complete the contract:

(a) see *Stocznia v Gdanska SA v Latvian Shipping Company (No.2)* [2002] EWCA Civ.889 at para 87: "In my judgment, there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do.

(b) see *Byrne & Co v Leon Van Tienhoven & Co* (1880) 5 CPD 344 the court said at p 350: "It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it ... .It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted.

[47] The plaintiff submits that as a result of a letter dated 12 July 2006 (B3/784–787) through TNECC, the defendant had effectively terminated the sub-contract (LOA). With respect I disagree for the following reasons.

(a) as submitted by the defendant, since it is not the plaintiff's pleaded case, the plaintiff is estopped from raising it (see *RHB Bank Bhd (substituting Kwong Yik Bank Bhd) v Kwan Chew Holdings Sdn Bhd* [2010] 2 MLJ 188 at p 202 (FC).

(b) there is no evidence that the letter dated 12 July 2006 was issued by the defendant 'through TNECC'.

[48] In this regard the plaintiff contends that the defendant should not have suspended works as a result of the environment issue. However with respect I find there is justification for the defendant to suspend the works on site on 20 July 2006 pending the investigation by DOE.

(a) the plaintiff was granted a permit to work (PTW)(B3/762) on 21 June 2006 and commenced work on that date or soon thereafter. On 29 June 2006 the DOE ('Department of Environment') visited the site and identified environmental problems (B3/768 1st para).

(b) the plaintiff did not produce any witness to deal with the DOE issue and SP1 had little or no knowledge on this as admitted by him in cross-examination (NOE dated 29 April 2013 pp 143 lines 26–37 – p 144 lines 1–4.

(c) the notice from DOE dated 14 July 2006 (B3/788-789) shows that the plaintiff's works in relation to the scheduled waste was not carried out in accordance with the applicable environmental law (2nd para of the said notice). The plaintiff failed to obtain approval from DOE and also failed to obtain PTW from TNB or the defendant to carry out schedule waste

works on the site as is admitted by SP1 in cross-examination (NOE dated 29 April 2013 p 149 lines 13–36 – p 150 lines 1–8). This is evident from the following sequence of events stated in the defendant's submission:

> 79 On 10/7/2006 (B3/781), the Plaintiff wrote to the defendant informing that the Plaintiff is commencing dismantling, demolition and disposal works at Fuel Oil Tank No 4, 5 and 6 ('FOT') with effect from 10/7/2006 and the substance contained in the FOT was Scheduled Waste. Although the Plaintiff issued this letter only on 10/7/2006 the Plaintiff had in fact started working on the FOT area earlier as a result of the PTW which was issued on 21/6/2006 (B3/762).
>
> 80 On 10/7/2006, TNB issued a letter to the defendant (B3/782) stating that the Plaintiff had commenced works at FOT prior to obtaining PTW and instructed the defendant to submit an application for PTW and stop works at FOT. The defendant issued a notice to the Plaintiff on the same day notifying the Plaintiff's entry to the FOT area without proper permission. Despite the notice, the Plaintiff proceeded with the works.
>
> 81 On 14/7/2006, TNB received a letter from DOE stating that based on a visit carried out by DOE to the site on 29/6/2006, DOE found that the schedule waste works at the site were not carried out in accordance with the Rules of the Environment Quality (Schedule Waste) 2005 and Section 34B of the Environment Quality Act 1974.
>
> 82 Further, by this letter, DOE instructed TNB to stop the extraction of the schedule waste from the site from 14/7/2006. DOE also informed TNB that failure to follow the DOE's instructions would expose TNB to legal action without any further notice and if it's found liable, it might be fined up to RM500,000.00 or imprisoned for not more than 5 years.
>
> 83 After receipt of the DOE's notice dated 14/7/2006, TNB issued a notice to the defendant (B3/799) instructing the defendant to stop any transportation of schedule waste from the site commencing from 14/7/2006 and to suspend all works at the FOT site.
>
> 84 As a result of this, on 18/7/2006 (B3/803-804) the defendant issued a letter to the Plaintiff informing the Plaintiff that as a result of the dismantling/demolition works at the FOT site, TNB has been issued with a notice by DOE informing them not to transport any schedule waste from the site and this will have a serious effect on all other works at the site.

[49] The plaintiff commenced work on the FOT area although they did not have the necessary permit and permission to work in the area from DOE (NOE dated 29 April 2013 p 153 lines 32–35 – p 154 lines 1–20). Despite being issued with instructions by the defendant to stop work at the FOT area commencing from 18 July 2006, the plaintiff did not comply with the same (NOE dated 29 April 2013 p 157 lines 8–32).

SP1 agreed in cross-examination that item A5 to the consortium agreement (B2/436) provides that any disposal of any scheduled waste must be done by DOE's licensed contractors and in accordance with DOE's regulations. However SP1 could not even remember whether the contractor appointed by the plaintiff was licensed by DOE and no such evidence was led by the plaintiff on this (NOE dated 29 April 2013 p 133 lines 1–28).

The plaintiff's claim that a visit by a DOE officer on 15 July 2006 shows that he was satisfied with the plaintiff's management of the schedule waste at the site is debunked when SP1 himself accepted that the plaintiff's allegation is contrary to the notice by DOE of 14 July 2006 and he admitted there was no letter confirming that DOE was satisfied with the plaintiff's management of schedule waste.

[50] Apart from the management of schedule waste, the plaintiff was obliged to exercise control of the site as per item A4 to the consortium agreement (B2/435). SP1 in cross-examination admitted it was the plaintiff's obligation to provide the dust suppression system and that the failure to provide the same would cause pollution. This failure by the plaintiff caused Perai Power Sdn Bhd (the neighbour to the site) to issue a demand letter of 23 August 2006 (B3/855-856) to TNB (owner of the site) for payment of RM1.77m as 'damages suffered due to the excessive pollution brought about by the demolition works performed by TNB's contractors on site.

(a) the plaintiff alleges that when the Perai Power Sdn Bhd issued its letter of 23 August 2006, the plaintiff had already stopped work on site and could not have caused the problems of dust control as complained in the said letter. It is to be noted that the Perai Power Sdn Bhd letter did not state that dust pollution problem only occurred in August 2006. In fact Perai Power Sdn Bhd had prior to August 2006 complained to TNB in relation to 'Fuel Oil Tanks demolition works', under the heading 'Complaint by PPSB' in TNB's letter dated 17 July 2006 (B3/799) to the defendant. This shows that the incident had occurred in July 2006 which was before the issuance of the letter of 23 August 2006 from Perai Power Sdn Bhd;

(b) the plaintiff denied causing any pollution contending that at the material time it was only carrying out dismantling works and not demolition works. I find this is not correct as DW2 in cross-examination explained that dust could be generated when carrying out the dismantling works as demolition works (NOE dated 15 May 2013 p 141 lines 32–37 - p 142 lines 1–34); and

(c) in the circumstances I find since the plaintiff has failed to provide the dust suppression system, I agree with the defendant that it is entitled to require to all works to be stopped until the issue is resolved.

[51] To sum it all, premised on the reasons stated above, I find the plaintiff has ample grounds to suspend the works until the DOE issue is resolved. Consequently, the plaintiff not entitled to idling costs for the period between 20 July 2006 to 17 November 2006 as the plaintiff should not take advantage of its own wrong. I rest on the authorities cited by the defendant:

(a) *ABB Distribution Sdn Bhd v GKM Development Sdn Bhd & Anor* [1998] 7 MLJ 292 at p 301; *BDW Trading Ltd (t/a Barratt North London) v JM Rowe (Investments) Ltd* [2011] EWCA Civ 548 at paras 28 to 31. *Pentadbir Tanah Daerah Petaling v Swee Lin Sdn Bhd* [1999] 3 MLJ 489; [1999] 3 CLJ 577 and *Roberts v The Bury Improvement Commissioners* 1870 LR 5 CP 310 at 326.

(b) in Chitty on Contracts (2012) at para 12–082 it is said that: 'PARTY CANNOT RELY ON HIS OWN BREACH It has been said that, as a matter of construction, unless the contract clearly provides to the contrary it will be presumed that it was not the intention of the parties that either should be entitled to rely on his own breach of duty to avoid the contract or bring it to an end or to obtain a benefit under it. This presumption applies only to acts or omissions which constitute a breach by that party of an express or implied contractual obligation, or (possibly) of a non-contractual duty, owed by him to the other party ... .'

The plaintiff could have and should have mitigated its losses by demobilising the staff and machinery it had on the site (see *Bekalan Sains P&C Sdn Bhd v Bank Bumiputra Malaysia Bhd* [2011] 5 MLJ 1 [77] at para 215(CA). There was no reason for the plaintiff to remain on site for a period of four months and not do work as the plaintiff shown why it needed to remain on the site or why it could not demobilise its workers and equipment.

The plaintiff submits that the DOE letter of 14 July 2006 does not refer to the plaintiff's works but to the works of Hajat Murni (paras 93–96 of the plaintiff's written submission, particularly para 95.9). With respect I find this contention is untenable and the evidence shows otherwise. Hajat Murni is a sub-contractor of the plaintiff and the plaintiff must take responsibility for its own sub-contractor; further the defendant failed to put these issues to the defendant's witnesses to support their contention and failed to adduce evidence that there was another contractor on site working on the FOT.

The plaintiff contends that the defendant has failed to call the maker of the DOE letter dated 14 July 2006 and has urged the court to draw an adverse inference under s 114(g) of the Evidence Act 1950 against the defendant. In my view s114(g) cannot be invoked against the defendant as per submission of the defendant that:

(a) The letter from DOE dated 14/7/2006 is clear and unequivocal that the works in relation to the scheduled waste were not carried out in accordance with applicable

environmental law. It was the Plaintiff who was granted the access to the site to carry out the dismantling and demolition works at the FOT area. As such, without any doubt, it was the Plaintiff who carried out the scheduled waste works thereat.

(b) In the circumstances, the burden is on the Plaintiff to prove that there was no breach of any environmental law and as such the Plaintiff is obliged to prove that the contents of the DOE's letter dated 14/7/2006 are not true. However the Plaintiff failed to do so. As such s.114(g) should be invoked against the Plaintiff.

(c) In any event s. 114(g) does not apply against the defendant as the Plaintiff has failed to show that the defendant had withheld the evidence in relation to the DOE issue: see *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen & Ors.* [1998] 1 MLJ 465 at page 519.

Whether the defendant was justified in terminating the LOA on 17 November 2006

Whether the plaintiff is entitled to the idling costs for the period between 17 November 2006 (termination) to 30 January 2007 date when the compromise was reached .

[52] I shall deal with the above two issues together. The plaintiff in submission(para 103) states that the defendant 'seems to suggest that the sub-contract (LOA) was properly terminated by the defendant issuing its letter dated 17 November 2006 purely on the basis that the plaintiff had failed to produce/pay the Performance security bond and further payment in accordance with the terms of the sub-contract'. In my opinion this statement is inaccurate I find the defendant has relied on the grounds set out in the notice to terminate dated 12 October 2006 (B3/877-880) and the termination notice dated 17 November 2006 (B4/907-912), the former is referred to in para 2 of the latter as 'We further refer to our letter dated 12 October 2006 to l-Expo and TNECC ('the demand') and the response to the Demand vide letter dated 8th November 2006 from l-Expo to TNEC ('the response').' The said grounds are:

(a) failure to provide the performance bond and further payment under LOA;

(b) failure in exercising adequate dust control at the site;

(c) violation of the DOE regulations; and

(d) delay in completion of works as a result of the injunction obtained by Monogal a/l Appuny on 18 August 2006.

[53] The main ground of termination is the failure to submit the performance bond and the final payment to which the plaintiff relied heavily on the defence that there was a variation of the LOA. I have given my reasons

in paras 44 to 45(e) above why I find there is no variation as alleged by the plaintiff but instead the defendant has given the plaintiff an indulgence alluded to in paras 46(a) to 46(b) above.

To bolster his argument of whether there was a variation for the production/payment of the performance security bond and further payment under the LOA, the plaintiff placed reliance on the finding of the learned High Court judge on 27 January 2007 which reads:

> The very fact that the defendant had allowed the plaintiff to take such action before the performance bond and the final payment of the RM2 million had been provided by the plaintiff and thereafter had allowed the plaintiff to work the contract for 4 months before deciding to purportedly revoke the contract, clearly supports the plaintiff's contention that there was a variation with respect to the plaintiff's obligation on these two essential conditions of the contract.'

With respect this approach by the plaintiff is misplaced as it is only a provisional finding and not conclusive (see *Professor Dr A Kahar Bador & Ors v N Krishnan & Ors* [1983] 1 MLJ 407 [409B-E right column).

[54] On the issue of the plaintiff's allegation that the defendant sought to make arrangements for the sale of the turbines/ancillaries to 3rd parties in lieu of the performance bond (paras 55-79 of the plaintiffs submission), in my judgment there is no merit in such a contention. The totality of the evidence shows that the plaintiff did not have the funds to finance the project and raise the performance bond and the final payment as:

(a) the initial payment of RM12m was made by Metro Ganda to the defendant on 7 March 2006(B3/ 638-640) and not by the plaintiff;

(b) there was a dispute when the plaintiff failed to pay Anaphony Plastic Recycle Sdn Bhd which resulted in Anaphony attending meetings in the presence of the defendant to work out commercial solutions to the problem (B3/767–776, minutes of the meeting dated 29 June 2006 particularly Item 2.1 @ p 768, item 2.2 at P-769);

(c) the defendant did not enter any written arrangement with the plaintiff to reflect this alleged variation;

(d) the agreements with the third party (Mutiara Powertech Sdn Bhd) did not materialise;

(e) the purpose of the defendant getting involved was to ensure that payment will be directly made to the defendant by the third party. In this regard the plaintiff contends that the defendant interfered in the sub-contract by insisting the turbines be sold to the third party nominated by them bears no merit. This is because the evidence shows it is the plaintiff who was in fact seeking indulgence from the defendant in attempting to meet its

financial obligations under the LOA as evident from the letters of 3 April 2006, 8 May 2006, 15 August 2006 and 16 August 2006 to the defendant; however none of the proposals were accepted by the defendant (see para 45– 45.5 above);

(f) the further payment was made on 5 March 2007 was from the sale of scrap metals and not from cash of the plaintiff (see para 31 above); and

(g) the application for performance bond was made by MDH Maju Sdn Bhd (B3/658–667) and not the plaintiff and the performance bond was never delivered.

As the plaintiff failed to provide the performance bond and the further payment within the stipulated periods (see para 8(b) and (c) above), the defendant was entitled to revoke the LOA (see para 8(e) above).

[55] This brings me to the plaintiff's contention that the defendant's letter of termination is wrong as it is not in accordance with cl 12.1 of the Fidic short form of contract in that the defendant did not issue a fourteen days' notice requesting the plaintiff to remedy its breaches and a further twenty one days' notice to terminate the LOA. In my judgment the plaintiff's contention is without merit for these reasons;

(a) clause 12.1 of Fidic reads:

> 'If the Contractor abandons the Works, refuses or fails to comply with a valid instruction of the Employer or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the Contract, the Employer may give notice referring to this Sub-Clause and stating the default.
>
> If the Contractor has not taken all practicable steps to remedy the default within 14 days after the Contractor's receipt of the Employer's notice, the Employer may by a second notice given within a further 21 days, terminate the Contract. The Contractor shall then demobilise from the Site leaving behind Materials and Plant and any Contractor's Equipment which the Employer instructs in the second notice is to be used until the completion of the Works.

(b) First, the cases relied on by the plaintiff in support of its proposition are not applicable as the authorities deal with the manner of service of the notice and not the issue of timeline set out in cl 12.1 as pointed out by the plaintiff:

> (c) in Central Provident Fund Board v Ho Bock Kee and Fajar Menyensing Sdn Bhd v Angsana Sdn Bhd, the issue was whether the termination letter issued by hand instead of registered post as provided under the contract amounts to a valid termination. The courts held that the termination notice should have sent out by registered post as

provided under the contract instead by hand.

(d) in Pembinaan LCL Sdn Bhd v SK Styrofoam (M) Sdn Bhd, the issue was again in relation to the validity of the termination notice which was issued by way of fax instead of by registered post as required by the contract. The court held that the termination notice was not valid.

(e) in Wira Sawit Sdn Bhd v Hj Alang Mohd Samin bin Tak Salleh & Anor, the issue was whether the termination letter issued without instructions from the representatives of the land owner as provided by the contract was a valid termination letter. The court held that the requirement of the contract must be followed and as such the letter issued without the proper instructions is not valid.

(a) the defendant has met the requirements of the timelines set out in cl 12.1 as the defendant through its letter dated 12 October 2006 had given thirty days' notice to the plaintiff to remedy its breaches which is more than the fourteen days required under cl 12.1 of Fidic to remedy its breaches.

(b) in any event the requirement of cl 12.1 is applicable only to breaches which can be remedied. I find support for this proposition in the following cases cited by the defendant:

(In *Wickman Machine Tool Sales Ltd v L SchulerAG* [1972] 2 All ER 1173 at p 1182, Lord Denning held as follows:

'Take another case when one party commits a breach which was not capable of remedy, as if Wickman Sales disclosed important trade secrets to a rival. I do not think that Schuler would have to give a 60 day notice under cl 11(a). In short, if one party or the other was guilty of a breach which went to the root of the contract and was not capable of remedy, then the injured party could treat himself as discharged from further performance. But, if it is a breach which does not go to the root of the contract- and it is only a material breach which is capable of remedy- then cl 11(1)(a) does apply.')

As alluded to before the plaintiff was not in a position to remedy its breaches particularly, to provide the performance bond and to pay further payment as the plaintiff did not have the funding despite ample opportunity given. Therefore I agree with the defendant's submission that any failure to give the notice under cl 12.1 of Fidic is immaterial.

(c) further, in any event the plaintiff was fully aware of the danger of termination since March 2006 as per the three demand letters of 17 March 2006, 24 March 2006 and 31 March 2006 (see para 44(b) above).

[56] With respect to the injunction obtained by Monogal a/l Appuny, it restrained the plaintiff from extracting the scrap metals from the site for almost

three months and the plaintiff was compelled to sell the scrap metal to Metro Ganda only. The injunction was set aside only on 13 November 2006 (B3/894-896). The injunction prevented the plaintiff from performing the LOA and hence there was a breach which is a valid ground for termination.

[57] In relation to the violation of the DOE regulations and the failure to provide adequate dust control at the site I shall rely on paras 48 to 50(c) above. These violations allow termination under cl 6 of the LOA.

[58] The plaintiff's company search dated 27 April 2007 (B1/22–28) shows that the plaintiff has not filed its financial statements and plaintiff failed to provide management accounts though requested in cross-examination.

[59] As to the plaintiff's contention that the right to terminate has been lost because of substantial performance, in my judgment it is misconceived. I agree with the defendant's submission that the fact that initial payment, insurance premiums and other charges were made to workers and machinery were mobilized (subject to the caveat in paras 51 and 51(a) above) in the earlier period of the project does not absolve the plaintiff's breach in relation to the performance bond and further payment.

For all the reasons stated above, I find that the termination by the defendant is valid and the plaintiff is not entitled to its claim for loss and expenses from 17 November 2006 to 30 January 2007.

Whether by the terms of the LOA the plaintiff was awarded the package B works

[60] In relation to this issue, broadly, the plaintiff contends that (i) package B had been awarded to the plaintiff based on various arguments which I shall address later; and (ii) the plaintiff has a right of first refusal citing the case of *Leong Ah Tee v Soo Ah Hing* [1999] MLJU 730; [2000] 6 CLJ 423(HC) at p 428 d-i to p 429 a-g.

[61] In relation to ground (i), the plaintiff contends that the package B works were awarded to them in that:

(a) drafts of the letter of award refer to package B;

(b) there is a reference to package B works in the consortium agreement; and

(c) insurance had been secured for package B.

[62] The plaintiff relies on the draft letters of award at B5/1081–1085 and B5/1086–1090 to support its contention that the defendant had agreed to pay

the plaintiff a sum approximately RM8m for package B works. I find the plaintiff's contention is misconceived for the following reasons:

(a) first, the drafts bear no weight at all as they have been superceded by the LOA that was actually signed. This fact was admitted by SP1 in cross-examination (NOE dated 29 April 2013 p 19 lines 32–37, p 20 lines 4, 22 to 34). There was no concluded contract of the terms of the draft as borne out in the case of *Tan Leng Choo & Ors v Law Teck Huat* [2009] 1 MLJ 820, [834 para 50] where the Court of Appeal held :

> 'Preliminary or preparatory steps, such as proposals for further and additional terms, taken during negotiations for the purpose of achieving consensus ad idem, unless finally agreed upon, cannot constitute a concluded contract. It is essential to have an unqualified offer and acceptance.'

(See also *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 (HL) at p 114(3)

(b) the defendant cannot rely on draft letters to contradict the clear provisions of the LOA as it is not permissible under s 91 and s 92 of the Evidence Act 1950 (see *Tractors Malaysia Bhd v Kumpulan Pembinaan Malaysia Sdn Bhd* [1979] 1 MLJ 129(FC) at p 130 C–D right column).

[63] The plaintiff contends that Item A8 of the schedule of the consortium agreement shows that the plaintiff was awarded package B. With respect I am of the view that the plaintiff's contention is without merit.

(a) first, the consortium agreement is between the plaintiff and TNECC to which the defendant is not a party and cannot be bound.

(b) the LOA states that the package B had not been awarded and thus any work described to be package B works are subject to the award of the contract being made by the defendant to the plaintiff ie the appointment of the consortium by the defendant. This is borne out by cl 3.6 of the consortium agreement which states:

> 'Where there is a variation in the Sub-Contract within Clause 3.5 which results in an adjustment to the Contract Price, Clauses 3.3 and 3.4 shall continue to apply, IESB shall be obliged to pay part of the adjusted Contract Price that relates to that of work or materials for which it is respectively responsible. In the event that the Consortium shall have been awarded the contract for package B as described in the draft letter of award, the parties shall mutually discuss and agree on their respective responsibilities and entitlements.' (Emphasis added.)

(c) the works described in Item A8 of the schedule relates to package A works and not package B. The reason being item A8 refers to additional works to excavate below the ground level up to the pile cap level whilst package B works provides for 'excavation and backfilling up to 150mm

above ground water with the area covering the entire 3X 120MW units and 132kV Switchyard.' (see paras 5–7 above).

(d) the description of the work mentioned in item A8 of the consortium agreement does not include package B works was confirmed by SP1 in cross-examination (NOP dated 26 April 2013 p 111 lines 25–36 & p 112 lines 1–7).

[64] The plaintiff contends upon the instructions of the defendant, the plaintiff paid the insurance premiums for the entire works including package B and relies on the following:

(a) cover note at pp 645–651 of B3;

(b) cover note at pp 652–665 of B3;

(c) bankers cheque for the sum of RM275,645 at p 644 of B3;

(d) defendant's letter dated 21 September 2007 at p 1023 of B4;

(e) plaintiff's letter dated 21 September 2007 at pp 1025–1026 of B4; defendant's e-mail dated 17 September 2007 at p 1024 of B4;

(f) defendant's letter dated 30 January 2008 at p 1027 of B4;

(g) letter dated 31 December 2007 from Malene Insurance Broker at p 1028 of B4;

(h) plaintiff's letter dated 26 February 2008 at p 1029 of B4; and

(i) banker's cheque for a sum of RM78,520.49 at p 1030 of B4.

However these documents do not show any instructions by the defendant to the plaintiff to pay insurance premiums for package B.

It is not disputed that by cl 5 of the LOA (B2/391), the consortium is obliged to procure all related insurance coverage. Therefore the plaintiff cannot be prejudiced by procuring coverage for package B when it had not been awarded to them. In any event, P1 in cross-examination failed to show that the defendant instructed the plaintiff to procure the insurance coverage for package B works albeit after a series of questions (NOE dated 26 April 2013 pp 111–123).

[65] The plaintiff's contention that it had the first right of refusal cannot be sustained as the plaintiff did not exercise that right as it did not make any request to proceed with package B works and therefore this argument is with respect at best a mere afterthought conceived for the purpose of this action.

[66] With respect I agree with the defendant that on a true construction of the LOA package B was never awarded to the plaintiff. This is because pursuant

to cl 3(b) of the LOA, the consortium was given a first right of refusal for package B under the LOA works subject to the consortium's performance of package A(i) and A(ii) being satisfactory to the defendant. This is evident from a reading of cl 3b of the LOA (B2/390):

> Package B Provided that the Consortium's performance of package A shall be satisfactory to TNEC, the consortium will be given the first right of refusal to undertake additional works for the Demolition of Substructures down to pile cap level, excavation and backfilling up to 150mm above water with the area covering the entire 3x 120MW units AND 132kV Switchyard.

(a) given that the LOA was terminated due to the poor performance of the plaintiff as I have alluded to, as such the defendant was not obliged to award package B to the plaintiff since the precondition ie the defendant being satisfied with package A(i) and A(ii) was never achieved (see *Aberfoyle Plantations Ltd v Khaw Bian Cheng* (1960) 1 MLJ 47 (Privy Council) at p 50 D right column and the former was referred in the case of *Nga Sheau Sheau v United Merchant Finance Bhd* [2004] 4 MLJ 53; [2004] 3 CLJ 243 (HC) at pp 249 f & 250 g where Low Hop Bing J (as His Lordship then was) held that the loan agreement was not binding on the defendant as it was subject to a condition precedent which was not fulfilled).

[67] For the reasons stated above, in my judgment by the terms of the LOA, package B was never awarded to the plaintiff.

CONCLUSION

[68] The court has given anxious consideration to the evidence and submissions of the parties. On a balance of probabilities the court held the plaintiff has not proven its claim. The plaintiff's claim was therefore dismissed with costs fixed at RM70,000.

Claim dismissed.

Reported by Ashok Kumar